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Date of Decision: 13th December 1995

CRIMINAL APPEAL NO. 619 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Shri H.M. Chinoy, Advocate, for the Appellant

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent

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CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 13th December 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 6th September 1989 in Sessions Case No. 82 of 1988 convicting the appellant of the offence punishable under sec. 8 read with sec. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and also under

sec. 66(1)(b) read with sec. 67A of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for one year more for the offence punishable under the NDPS Act without awarding any separate sentence for the offence punishable under the Prohibition Act is under challenge in this appeal at the instance of the original accused.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that, while on patrolling duty on 1st December 1987 on information received from the private informer, the Police Inspector of the Town Police Station at Nadiad, named, Shri B.K. Rathod (the complainant), effected the search of the present appellant in presence of two panchas. It was found from his person what is popularly known as charas to the tune of about 60 gms. Thereupon the complainant lodged his complaint charging the appellant with the offence punishable under sec. 20(b) of the NDPS Act and sec. 67 of the Prohibition Act. The proceeding arising therefrom came to be registered as Sessions Case No. 82 of 1988 in the Court of the Sessions Judge of Kheda at Nadiad. On conclusion of the trial, it culminated into conviction of the appellant of the offence punishable under sec. 8 read with sec. 20(b)(ii) of the NDPS Act and of the offence punishable under sec. 66(1)(b) read with sec. 67A of the Prohibition Act and sentence of rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for one year for the offence punishable under the NDPS Act without awarding any separate sentence for the offence punishable under the Prohibition Act. The aggrieved accused has thereupon invoked the appellate jurisdiction of this court by means of this appeal questioning the correctness of his conviction and sentence as aforesaid.

3. Since this appeal can be disposed of on the short ground based on non-compliance with the mandatory provisions contained in sec. 42(1) of the NDPS Act, we have not chosen to deal extensively with the rival submissions urged before us at the time of hearing. The aforesaid statutory provision has been held to be mandatory by the Apex Court in its binding ruling in the case of State of Punjab v. Balbir Singh reported in AIR 1994 SC 1872. It has been provided therein that information received with respect to any narcotic drug or psychotropic substance amounting to an offence punishable under the NDPS Act has to be reduced to writing by the officer named therein. Non-compliance therewith is held to be fatal to the prosecution in view of the aforesaid binding ruling of the Supreme Court.

4. In the present case, the complainant in para 8 of his oral testimony at Ex. 12 has clearly admitted that he did not

reduce to writing the information regarding possession by the present appellant of charas received from some private informer. In fact, in para 8 of his deposition at Ex. 12 he has gone to the extent of pleading ignorance of existence of any such statutory provision. Such ignorance of the aforesaid statutory provision on the part of a gazetted police officer can be said to be simply unpardonable. However, at present such ignorance on the part of the complainant need not detain us any longer. Suffice it to say that the aforesaid mandatory statutory provision contained in sec.42(1) of the NDPS Act has not been complied with in the present case. That would vitiate the trial as ruled by the Apex Court in its aforesaid ruling.

5. The learned trial Judge has convicted the appellant also under sec. 66(1)(b) read with sec. 67A of the Prohibition Act. Learned Advocate Shri Chinoy for the appellant has not been able to make any dent in the prosecution evidence in that regard. With respect, the learned trial Judge has carefully scanned and scrutinised the evidence on record and has recorded a finding of guilt against the appellant qua the offence punishable under the Prohibition Act. That finding cannot and need not be interfered with in view of the overwhelming evidence on record.

6. That brings us to the question of sentence for the said offence. Section 66(1)(b) of the Prohibition Act is somewhat harsher for the purpose of punishment than sec. 67A thereof. The maximum sentence imposable under sec. 66(1)(b) thereof is imprisonment for 3 years and fine of Rs. 1000. We are told that the appellant has beein in jail since the date of his arrest on 1st December 1987. He has thus undergone imprisonment for more than 8 years as on today. He need not therefore be subjected to serve any fresh or further term of imprisonment for the offence punishable under the aforesaid statutory provision contained in the Prohibition Act. The maximum fine which can be imposed on the appellant for the offence punishable thereunder is Rs. 1000. The appellant can be subjected to rigorous imprisonment for a period of one month more in default of payment of fine. That period also he has already undergone. In that case, it is not necessary to subject him to any further term of imprisonment though we propose to award sentence of imprisonment and fine on the appellant. The appellant deserves to be sentenced to rigorous imprisonment for 3 years and fine of Rs. 1000 in default rigorous imprisonment for a period of one month more for the offence punishable under sec. 66(1)(b) read with sec. 67A of the Prohibition Act.

7. In the result, this appeal is partly accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions of Kheda at Nadiad on 6th September 1989 in Sessions Case No. 82 of 1988 qua the offence punishable

under sec. 8 read with sec. 20(b)(ii) of the NDPS Act is quashed and set aside. The conviction of the appellant of the offence punishable under sec. 66(1)(b) read with sec. 67A of the Prohibition Act is maintained. He is sentenced to rigorous imprisonment for 3 years and fine of Rs. 1000 in default rigorous imprisonment for one month more. Since the appellant has been languishing in jail since 1st December 1987, he is not required to serve any fresh or further sentence imposed on him by this judgment and order of ours. He should be set at liberty if no longer required in any other case. The muddamal may be disposed of according to law.
